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IN THE

Supreme Court of the United States

October Term, 1961
No. 271

MARIETTA PAGE,

Petitioner,

vs.

TELFORD WORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (App. A of Petition) is reported at 178 Fed. Supp. 184. The opinions of the Court of Appeals for the Ninth Circuit on Petitioner's appeal (App. B. of Petition) and denying Petition for Rehearing (App. C. of Petition) are officially reported in 290 Fed. 2d Adv. Sheets 323, and are unofficially reported in C.C.H. 1961 Trade Cases, ¶69,955, p. 77,804 and ¶70,013, p. 78,015, respectively.

Jurisdiction

The general jurisdictional requisites for a Petition are set forth in the Petition; however, there is no

Federal Jurisdiction under the antitrust laws in this case. The alleged activities in the local *intrastate* market or field of legal advertising in Los Angeles County, California, do not directly or substantially affect or tend to monopolize any interstate commerce in which the parties engage.

Questions Presented

The Petition tenders five unintelligible and academic questions not expressed in the terms and circumstances of the case. The questions presented in the Petition do not apprise the Court or Respondents of the issues which Petitioner is seeking to have reviewed, but indicate rather a misconstruction of the opinions of the Courts below and the principles of law therein stated.

The real questions presented in this case involve well established principles of antitrust law not requiring review by this Court and are as follows:

1. Whether there is Federal Jurisdiction under antitrust laws where trade and commerce between the states is not involved in or affected by the alleged activities of Respondents with relation to *legal advertising* in Los Angeles County, the *intrastate* market which is the subject matter of this action?

2. Whether there is jurisdiction under §7 of the Clayton Act (Title 15, §18, U.S.C.) where Respondent Corporation acquired assets from *individual owners* who were successors in interest to the former corporate owner of the transferred assets, where such former corporate owner was voluntarily dissolved at the instance of the sellers of the assets?

3. Whether there is jurisdiction under §7 of the

Clayton Act (Title 15, §18, U.S.C.) where the relevant market involved in the case is the *intrastate* market of publishing legal notices in Los Angeles County, and competition in the interstate commerce in which the parties engaged was not lessened, monopolized or potentially monopolized by reason of the alleged activities of Respondents with relation to such *intrastate* relevant market?

4. Whether Petitioner can complain of a deprivation of a jury trial where there exists no genuine issue as to any fact material to the question of Federal Jurisdiction and Summary Judgment dismissing the action was granted as a matter of law?

Statutes and Rules Involved

The provisions of the Constitution, Statutes and Rules on which Petitioner relies are set forth in the Petition at pp. 3-5. Petitioner has omitted from the Petition Rule 56(a) of the Federal Rules of Civil Procedure invoked by Petitioner in Petitioner's Cross-Motion for Summary Judgment in the District Court on the question of Federal Jurisdiction under the Antitrust Laws. [R. 855] The pertinent provisions of said Rule 56(a) are as follows:

> "A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

STATEMENT

Respondents' Motion for Summary Judgment in the District Court was granted and the action was dismissed upon the ground that there was no Federal Jurisdiction to award damages in this Civil Antitrust action, involving only the local *intrastate activity of legal advertising*, which does not directly or substantially affect any interstate commerce in which the parties engaged in their respective businesses.

The Petition does not reflect the fact that Petitioner also joined in requesting the District Court to determine the question of Federal Jurisdiction in a Counter-Motion for Summary Judgment [R. 855-869], accompanied by a proposed form of Partial Summary Judgment "removing from the jury's consideration the question of interstate commerce and the question of jurisdiction". [R. 870] Petitioner's Cross-Motion was denied in the Order for Summary Judgment dismissing the action for lack of Federal Jurisdiction. [R. 1002]

Petitioner did not raise any genuine issue on the material facts which Respondents set forth in their Motion as determinative of the question of Federal Jurisdiction [R. 623-630] but Petitioner rested her opposition and her Counter-Motion upon an erroneous concept of law concerning the basis for Federal Jurisdiction under the Sherman and Clayton Acts, contending in that regard that the test of Federal Jurisdiction under the antitrust laws is whether the parties are engaged in any interstate commerce, and urging that a different set of facts is determinative of the question of Federal Jurisdiction.

In an effort to challenge the attention of this Honorable Court, Petitioner has tried to broaden the scope of the action by argument and contentions in the "Statement of the Case" in the Petition that "the business of printing and publishing newspapers" is the "trade or commerce between the states" involved in this action. The "Statement of the Case" in the Petition does not contain a recital of facts sufficient to acquaint this Court with the subject matter of the action and the material facts of the case on which the District Court Judgment and decision of the Court of Appeals rest. Respondents therefore set forth herein a statement of facts material to the consideration of the questions presented, which will also reflect inaccuracies and omissions in Petitioner's "Statement of the Case":

Statement of Facts

This private action for treble damages was originally instituted by Marietta Page in her own behalf, and since the filing of the Fourth Amended Complaint was continued as an alleged derivative stockholder's suit on behalf of Consolidated Printing and Publishing Company (hereinafter referred to as "Consolidated"), a dissolved corporation.

Re "Relevant Market" Involved:

Petitioner's claim of loss to Consolidated is based on claimed loss of revenue from *legal advertising.* Petitioner makes no claim of loss to Consolidated from circulation, display advertising, classified advertising, job printing, or rule books, which were the sources of revenue of Consolidated other than the publication of legal advertising. [Admissions, R. 677-678]

Legal advertising, as required by California law, is divided into two basic categories: (a) *public legal advertising*, consisting of notices placed by Federal, State, County, City, School Officials, or other governmental agencies required by law to cause notices to be published in newspapers of general circulation *within the State of California;* and (b) private legal advertising, consisting of notices required by California law to be published *in California* in connection with the conduct of business within the State or in connection with court or other proceedings pending in California. *The market or field of legal advertising is limited by the number and type of notices required by law to be published.* [Admitted Facts, ¶77, 78, 79, and 80, R. 525-526]

Some California publication laws specify the place for publication, such as the Judicial District in which the properties involved are located or the city in which the business is conducted. Other laws and court rules require that a court shall make a finding as to the specific paper for publication of such notice most likely to bring notice to the persons affected. [Admitted Facts, ¶101, R. 530]

All of the legal notices published in the newspapers of Consolidated and in the newspapers of publisher Respondents were required by law to be published in Los Angeles County or political subdivisions thereof. The legal notices published in these newspapers were not required to be published or transmitted or circulated by the publisher out of the State of California or in any place within the State other than the place of printing and publishing the newspaper in which the notice is published. The market or field of legal

advertising is not in the "stream" or "flow" of interstate commerce, but is a *local intrastate activity.*

Re: Historical Background and Dissolution of Consolidated

Prior to its voluntary dissolution, Consolidated was the owner and publisher of two newspapers of general circulation, The Los Angeles Daily Journal (hereinafter referred to as "Journal") and the Independent Review-Greater Los Angeles (sometimes referred to as "Independent Review"). [R. 505] The papers of Consolidated were printed and published in Los Angeles Judicial District and were ineligible to publish private legal notices, published in various Respondent newspapers, by reason of requirements of California Law that certain notices be published in various districts where the property or businesses were located and which were outside of Los Angeles Judicial District. [Admitted Facts, ¶105, R. 531]

The stockholders of Consolidated wanted to sell the Journal and get their money out of the business. They were getting older and had problems of moving and building and felt they had a tax advantage in selling. The group represented by Telford Work wanted to buy. The Sale of the Journal was negotiated over a long period of time. "The deal was finally concluded satisfactorily to all of the former directors and all of the stockholders (of Consolidated) including Marietta Page." [Testimony of Dan W. Green, one of the directors and stockholders of Consolidated, R. 679, 680] One of the conditions of the sale, *imposed by the sellers,* was that the sale should not be made by Consolidated, the corporation, but should be made by the *individual*

successors in interest, and that Consolidated should be dissolved prior to such sale. This condition was imposed upon advice of Sellers' Tax Counsel as a method of sale designed to achieve a substantial tax saving. [Admitted Facts, ¶19 and 20, R. 506-507]

Mutual Newspaper Publishing Company, a corporation, (hereinafter referred to as "Mutual") was organized for the purpose of acquiring *certain* of the Journal Assets. The sale was made through a bank escrow between Marietta Page and the other owners of the Journal Assets as the sellers, and Mutual as the buyer. [R. 507]

On May 26, 1951, Consolidated filed a Certificate of Election to Dissolve with the Secretary of State of California, reciting that its shareholders holding more than 50% of its stock had directed the filing of Certificate of Election of said corporation to wind up and dissolve, accompanied by written consent of 50% or more of the voting stock of Consolidated consenting that said corporation "wind up its affairs and voluntarily dissolve". [Admitted Facts ¶14, R. 506; Defts. Ex. 2, summarized at R. 711-713]. On May 29, 1951, pursuant to election to dissolve, Consolidated *transferred and assigned the Journal business and assets to the individual stockholders of Consolidated* (including Marietta Page) in consideration of the surrender and cancellation of their stock in Consolidated. Such assignments also covered accounts receivable and other assets not included in the sale of the Journal Assets to Mutual. [Admitted Facts, R 506; R. 713] On May 31, 1951, Marietta Page, individually, together with the other individual owners of the Journal, transferred and assigned their respective interests in *certain*

Journal Assets to Mutual. [Admitted Facts, ¶25, 60, R. 502, 522]

The unfounded and unsupported contentions of Petitioner regarding "forced sale of Consolidated's assets" are inserted in the "Statement of the Case" in the Petition, in an effort to mislead this Court to the conclusion that Consolidated was eliminated as a competitor and that the sale of Journal Assets was a "forced sale". The admitted facts, on which there is no genuine issue, irrefutably show that the stockholders of Consolidated wanted to sell the Journal and liquidate their interest in Consolidated for reasons other than the alleged activities of Respondents. The change of ownership of the Journal is not determinative of the question of Federal Jurisdiction in this case. The District Court determined that the change of ownership in the Journal did not affect interstate commerce, finding and stating in that regard:

> "the Los Angeles Daily Journal, which is primarily devoted to legal advertising, carried insignificant quantities of national news and display advertising, so that even if we assume that the original Journal was eliminated as a competitor and the current Journal is a new and distinct entity, the elimination of the Journal also did not interfere with the flow of national news and display advertising." [R. 999-1000; App. A to Pet. p. 7]

Re: Historial Background and Activities of Respondents

It is conceded by Petitioner that all of the newspaper Respondents were "community newspapers"

serving small neighborhoods in and around Los Angeles, as distinguished from the metropolitan papers in the City of Los Angeles. Each of the Respondent newspapers had been judicially adjudicated by the courts of the State of California in and for Los Angeles County to be a newspaper of general circulation, thereby qualified to publish legal advertising in Los Angeles County. [Admitted Facts, ¶1, R. 503-504]

Certain local newspapers in the City and County of Los Angeles, desiring to compete in the field of legal advertising and to compete with the downtown Civic Center Legal newspapers, caused the Los Angeles Newspaper Service Bureau, Inc. (hereinafter referred to as "Bureau") to be formed and incorporated in January, 1934, in order to enable each publisher to have a downtown Civic Center representative. Each newspaper respondent individually used the services of Bureau under a separate representation agreement between the newspaper publisher and the Bureau for solicitation and servicing of private and public legal advertising published in the respective newspaper of each Respondent publisher. Each of the publisher members of Bureau with whom a separate representation agreement was executed was an independent newspaper establishment and each operated primarily in a local community within the large area of Los Angeles County. The subscription list of each Respondent newspaper was drawn primarily from the circulation area in the respective community of the paper. [Admitted Facts, ¶31, 32, 35, 36 and 85; R. 510-512 and 526]

Much of the solicitation of legal advertising was done individually by each newspaper in its own behalf

with the assistance of forms for such solicitation furnished by Bureau. Bureau also solicited the local publication of foreclosure notices by various officials and was active in bringing to the attention of public officials the existing requirements of California law for local publication of foreclosure notices and the availability of the community newspapers for publication of such notices. [Admitted Facts, ¶55, R. 520-521] The Bureau was active in fostering the principle of the localization of publication of both private and public legal notices. [Admitted Facts, ¶87, R. 527] Some of the specific types of such localized legal advertising are more fully described in the Argument in Support of Respondents' Motion for Summary Judgment. [R. 765 to 770] A large part of these legal notices were required by law to be published locally long before the formation of the Bureau. [R. 765-769]

Findings of Fact and Decisions of Lower Courts

The District Court found that the Journal is the only newspaper involved which is primarily devoted to legal advertising; that the Journal has only 13 out-of-state subscribers, three of whom are complimentary, (out of total subscriptions of 4000); that legal advertisements for out-of-state clients appeared in the Journal, regularly, though on a very small scale (average 5 items per issue), and a great majority of these items were placed by local counsel. [R. 1001]

The District Court also found that there exists no "appreciable interstate market for Los Angeles legal advertisements or a Los Angeles market for legal advertisements placed by out-of-state clients", and that the few items printed in the Journal "are not 'sub-

stantial' or 'appreciable' amounts of interstate commerce by any standards . . . these items also come within the maxim *de minimus*." [R. 1000-1001] No error in such findings, based upon undisputed facts in this case was shown by Petitioner on appeal to the Court of Appeals.

The District Court also found that Consolidated and Respondent newspapers are engaged in interstate commerce by virtue of (1) their regular purchases of newsprint from sources outside of California, (2) their carriage of some national news and feature items, (3) their carriage of some national advertising, and (4) a *few* out-of-state subscribers; and that no showing was, or could have been made, that Respondents had any control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news; and even if Respondent newspapers were able to destroy the Journal by the exercise of control over the local legal advertising market, such control could afford Respondents "no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful their monopoly of the legal advertising market . . ."; "that even if we assume that the original Journal was eliminated as a competitor and the current Journal is a new and distinct entity, the elimination of the Journal also did not interfere with the *flow* of national news and display advertising." [App. A to Petition, p. 7] (Emphasis added)

The Court of Appeals affirmed the District Court's judgment dismissing the action for lack of Federal Jurisdiction upon well established principles of anti-

trust law as declared in the decisions of the Supreme Court of the United States and the Circuit Courts of Appeal, including the Ninth Circuit, concluding:

> "In our view the district court properly concluded that the effect of the activities of appellee newspapers in the local market on those interstate activities in which Consolidated and appellees were also engaged were indirect and non-existent, and no substantial effects were felt in the interstate markets of newsprint purchase, national and display advertising, national news dissemination and circulation." [App. B to Petition p. 27]

ARGUMENT

Introduction

The market or field of activity which is the subject matter of this civil antitrust action for damages is the *limited, local intrastate market of legal advertising in Los Angeles County.* Admittedly, Petitioner's only claim of loss to Consolidated is based upon alleged loss of revenue from legal advertising, and not from circulation, display or classified advertising, or other sources of revenue of Consolidated. [R. 677-678] In an effort to convert this case to one warranting review by this Court on Certiorari, Petitioner has attempted to broaden the relevant market or subject matter of the action in the Petition to "trade and commerce between the states in the business of printing and publishing newspapers". [Pet. p. 5]

The newspapers in this case were not competing for out-of-state circulation. The Journal had only thirteen out-of-state subscribers, (out of a total of 4000). Some

of Respondent newspapers had a few out-of-state subscribers. The interstate markets in which the parties were engaged were the purchases of newsprint from sources outside of California, and national news and display advertising. The District Court found that no showing was, or could have been made, that Respondents had any control or potential control over these interstate markets, and that control of the local legal advertising market could afford Respondents no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful a monopoly could be gained of the legal advertising market. [App. A to Pet. p. 7]

Petitioner's contention that the business of printing and publishing newspapers is the trade and commerce here involved is based upon a false premise, that legal advertising is necessary to survival of community newspapers. Petitioner's argument is supported only by the *dicta* in a decision of the California Appellate Court. [Pet. p. 11] The unrefuted facts are to the contrary of the court's dicta.

The annual receipts from legal advertising in Respondent newspapers averaged only 2% of all advertising published in said newspapers, in which only 50% of said newspaper is devoted to all advertising, including display, classified and legal. The other 50% of the content of said papers is devoted to news, editorial comment, comics, features and other information published in community newspapers. [R. 816; R. 848; and Exhibit 3 attached to Bergin Affidavit (not in the printed record at request of Petitioner)]

Petitioner's false premise of necessity of legal advertising for survival of community newspapers is

further refuted by Petitioner's inconsistent charge as a basis for claim of damage, that "Consolidated had virtually all of the legal advertising business in Los Angeles County when the Bureau was formed." [Pet. p. 19] It is therefore irrefutable that we are here concerned only with legal advertising, a fractional part of the newspaper businesses of Respondents, and not the whole "business of printing and publishing newspapers".

The Judgment of the District Court was manifestly correct. There is no interstate commerce here involved or affected by any of the alleged activities of Respondents with relation to legal advertising and no Federal Jurisdiction. There is no conflict of decisions and no important question of Federal Law requiring review by this Court.

I

There is No Conflict of Decisions

Petitioner asserts that the decision in the instant case is in conflict with the decisions of this court in *Klor's vs. Broadway-Hale Stores*, 1959, 359 U. S. 207 [3 L. ed. 2d 741] and in *Radiant Burners v. Peoples Gas L. & Coke Co.*, 5 L. ed. 2d 359, neither of which cases involved the question of Federal Jurisdiction. The market or subject matter in the *Klor's* case, *supra*, was the business of manufacturing, distributing and selling household applicances *in interstate commerce*, and in the *Radiant Burners* case, *supra*, the manufacture and sale *in interstate commerce* of ceramic gas burners. The decision in each of the cited cases rested upon "interference with the natural flow of

interstate commerce." In the instant case, the courts below found that there was no interference with any interstate commerce in which the parties were engaged by reason of any activities in connection with legal advertising, the intrastate market involved in this case.

In an effort to present a conflict for review by this Court, Petitioner misconstrues the decisions in this case and makes the false assertion that the courts below "enunciated two wholly erroneous rules of law": (1) "that in order for the District Court to have jurisdiction the Defendants' activities must result in less interstate commerce" and (2) "that the Defendants must have control or potential control over the interstate markets involved." [Pet. p. 13] Neither the District Court nor the Court of Appeals propounded any such preposterous rules of law in the decisions in this case. On the contrary, based upon the decisions of this Court in *United States v. E. I. Du Pont de Nemours & Co.*, 1956, 351 U. S. 377; *International Boxing Club v. United States*, 1958, 358 U. S. 424; *Times-Picayune v. United States*, 1953, 345 U. S. 594; *United States v. Yellow Cab Co.*, 1947, 332 U. S. 218; and *Mandeville Farms v. Sugar Co.*, 1948, 334 U. S. 219, the courts below followed the well-established principle that "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." [App. B. to Pet. p. 21, et seq.]

The decision in this case did not turn upon the mere fact that an intrastate activity was involved but was based upon the fact that such intrastate activity

did not "directly and substantially affect interstate commerce". The Court of Appeals, following the principles announced by this court, stated: [290 F. 2d 323, at 332]

> "There remains the question of whether the intrastate activity of publishing legal notices affects interstate commerce even though it is not in the flow of commerce. It is clear that some wholly local activities by parties neither of whom engage in interstate commerce may nevertheless affect interstate commerce. White Bear Theater Corp. v. State Theatre Corp., 8 Cir., 1942, 129 F. 2d 600. 'If it is interstate commerce that feels the pinch it does not matter how local the operation which applies the squeeze.' United States v. Women's Sportswear Mfgrs. Ass'n., 1949, 336 U. S. 460, 69 S. Ct. 714, 716, 93 L. ed. 805."

The Court of Appeals cited the *Klor's* case, *supra*, and the *Radiant Burners* case, *supra*, as illustrative of cases involving "creeping monopolization" of interstate commerce [290 F. 2d at p. 333] in contrast with the facts in the instant case where the court found there was no showing of any "control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news" [R. 1006] and that "the interstate trade or commerce in which plaintiff and defendants engage did not suffer any anti-competitive effects from the acts of defendants of which plaintiff complains." [R. 1008]

Petitioner next asserts that the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decisions of other circuits.

As distinguished from the case at bar, in each of the circuit cases cited in the Petition, the court found that the market or activity involved was in the "flow" or an "inseparable part of the flow" or "stream" of interstate commerce: In *White Bear Theaters Corp. v. State Theatre Corp.*, (8 Cir. 1942) 129 F. 2d 600, the court found "the market for the purchase of 'first-run' film rights at White Bear Lake, or for the sale of such rights and the supplying of films on the part of a producer, existed only in the channels, and as a part of the stream, of interstate commerce, it necessarily constituted an 'interstate market' ". In *Steers v. United States*, (6 Cir. 1911) 192 Fed. 1, the subject matter of the action involved the shipment from Kentucky to Ohio of the tobacco crop of three farmers which the court found "did constitute 'interstate trade and commerce' ". In *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, (1 Cir. 1952) 194 F. 2d 484, the market involved was the purchases by Gamco, Inc. of "fruit and vegetables in truck and freight car lots from interstate dealers for sale primarily to the bulk jobbers and retailers of the city" and the court also found that the selling market for such trade was centered in the building of defendant from which plaintiff was excluded. In *American Federation of Tobacco Growers v. Neal*, (4 Cir. 1950) 183 F. 2d 869, the court found that "the effect of the action of the defendants was to exclude a competitor from a substantial market in interstate commerce" (the tobacco market). In *Evening News Publishing Co. v. Allied Newspaper Carriers*, (3 Cir. 1959) 263 F. 2d 715, the court found that "the home delivery of the News is an integral part of the interstate operation" and that "the distribution of the News, a complete newspaper containing those

news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in *Lorain* (p. 152) '. . . an inseparable part of the flow of the interstate commerce involved.' "

The question of Federal Jurisdiction was not directly raised in any of the Circuit Court cases cited in the Petition. The qualitative test of Federal Jurisdiction was applicable in each of the cited cases upon the basis of the finding of a restraint or monopoly of the interstate commerce involved therein. Petitioner asserts a conflict with the decisions in the cited cases in that the courts below applied the quantitative test of Federal Jurisdiction to the facts here involved to ascertain "whether the intrastate activity of publishing legal notices affects interstate commerce even though it is not in the flow of commerce." [290 F. 2d at p. 332] We submit that *there is no conflict.* The quantitative test of Federal Jurisdiction is applicable to the facts of the instant case in which the market or subject matter of the action is the local intrastate activity of legal advertising. The cited cases are therefore distinguishable on the facts.

The *Evening Newspaper Publishing Co.* case, *supra,* was distinguished in the decision below on the basis that the restraint in the home delivery part of the interstate operation, "interfered with the interstate business of news and commercial advertising dissemination." [290 F. 2d at p. 331] Contrary to Petitioner's contention that the alleged "restraint applied in the case at bar did exactly the same thing as did the restraint in *Evening Newspaper Publishers Co. supra,* case" [Pet. p. 17] the courts below found that there was no restraint on any interstate commerce in which

the parties engaged. The Court of Appeals stated in that regard:

> "Appellees were in no position to nor did they restrict competition in the newsprint market. Uncontested facts show that the Bureau did not purchase newsprint for its members, and there was no evidence that appellees did anything to interfere with newsprint purchases by Consolidated. Newsprint is only one of many ingredients in a newspaper, which is a separate product from the ingredients of which it is composed. Newsprint is not the product involved in this case." [290 F. 2d at p. 332]
>
> "None of the activities of appellees made information contained in the Los Angeles Daily Journal unavailable to these 13 subscribers. Prior to the dissolution of Consolidated appellees did nothing to restrict the out-of-state circulation of the Journal." [290 F. 2d at p. 332]

Based upon the undisputed facts, the Court of Appeals held:

> "In our view the district court properly concluded that the effect of the activities of appellee newspapers in the local market on those interstate activities in which Consolidated and appellees were also engaged were indirect and nonexistent, and no substantial effects were felt in the interstate markets of newsprint purchase, national and display advertising, national news dissemination and circulation." [290 F. 2d at p. 333]

The attempt to secure a review by this Court of a non-existing conflict of decisions by the device of mis-

construing the decisions below and by fallacious arguments should not be countenanced by this Court. The decisions below correctly follow the well-established test of Federal Jurisdiction in anti-trust cases and are not in conflict with the decisions of this Court or of the Courts of Appeal in other circuits. There is no ground for review in this case.

II

The Decision Below Is Clearly Correct in the Statement of Congressional Intent to Apply Section 18, Title 15 U.S.C. Only to Cases Involving Interstate Commerce.

Petitioner also seeks review by this Court upon the ground of error in the decision of the Court of Appeals. [Pet. p. 18-19] Such contention is premised on distortion of the facts and misconstruction of the decision by the Court of Appeals.

Despite the indisputable facts that Consolidated, the corporation, was voluntarily dissolved and its assets distributed to its stockholders in surrender and cancellation of their stock in Consolidated [Admitted Facts, ¶4 and 15, R. 506], and that the Journal assets were sold and transferred to Mutual by the individuals to whom the Consolidated assets had been distributed [Admitted Facts, ¶60, R. 522], Petitioner persists in the false claim that the Journal Assets were acquired from Consolidated. [Pet. p. 18-19] The condition that the sale of the Journal Assets should not be made by the corporation, Consolidated, but should be made by the individuals who were successors in interest to Consolidated, was imposed by the individual sellers of the

Journal Assets and not by the purchasers. [Admitted Facts, ¶19 and 20, R. 506-507] Petitioner asserts such false statement of fact, well knowing that Section 7 of the Clayton Act is not applicable to a transfer of individually owned assets to a corporation.

The assertion in the Petition that the Court of Appeals stated "in effect that Congress did not have the power under the Commerce Clause of the Constitution to prohibit such an acquisition" [Pet. p. 18] (*claimed acquisition* of Consolidated's assets) is a misconstruction of the court's decision as to the Congressional power and intent. The court below stated [290 F. 2d at p. 333]:

> "We recognize that the general language of the Sherman Act and of the Clayton Act was designed by Congress to exercise its power under the Commerce Clause of the Constitution, U. S. Const. art. 1, §8, cl. 3 to the fullest extent, nevertheless, it must be interstate commerce which feels the pinch, or competition in interstate commerce which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in interstate commerce, before the provisions of said sections become applicable."

The legislative history of the reason for the 1950 Amendment to §7 of the Clayton Act (Title 15, §18, U.S.C.) sheds considerable light upon the Congressional intent and supports the decision of the Court below in that regard.

See: S. Rep. 1775, 81st Cong., 2d Sess. pp. 405, 2 U. S. Code Cong. Serv. (1950) p. 4296.

Despite the finding of the District Court, (which the Court of Appeals affirmed) that legal advertising "is not in the flow of interstate commerce" [290 F. 2d at p. 330], Petitioner persists in the contention that legal advertising as "an integral part of the newspaper publishing business" in Los Angeles County is in the flow of commerce. [Pet. p. 18] The Court of Appeals answers this fallacious contention thus: [290 F. 2d at p. 330]

> "Even granting the doubtful proposition that a process requiring fundamental and numerous changes in the nature of the product can constitute an uninterrupted flow, appellant's view of the flow of commerce relates to the newspaper business as a whole rather than the relevant market with which we are concerned, which is separate and divisible from other markets in which a newspaper may be engaged. In the antitrust field a relevant market may be narrower than the entire business operation of the business under scrutiny." (Citing decisions of this Court, in support of such statement)

Admittedly, the relevant market in this case is "the legal advertising market in Los Angeles County." [Pet. p. 19] Petitioner inconsistently argues that "Even were legal advertising not interstate commerce itself, or not an integral part of the interstate business of publishing newspapers, we have a situation where the Defendants, admittedly engaged in interstate commerce, were able to use the profits made in their interstate activities to underwrite their war with Consolidated." [Pet. p. 19] There is nothing in the record that would support such unfounded statement

that respondents either made any profits from their interstate activities, or that they engaged in any "war with Consolidated" or used any of their profits to the detriment of Consolidated. Such contentions are not relevant to the question of applicability of Section 7 of the Clayton Act to the intrastate relevant market of "legal advertising in Los Angeles County".

The case of *Moore v. Mead's Fine Bread Company*, 348 U. S. 115, cited in the Petition, at p. 19, does not support Petitioner's groundless contention that Section 7 of the Clayton Act applies to activities in connection with an intrastate relevant market, even though there is no restraint or power to monopolize the interstate commerce in which the parties engage. [Pet. p. 19] The *Moore* case, *supra*, involved the application of Section 3 of the Robinson-Patman Act (15 U.S.C. §13a) the express provisions of which prohibit discrimination of prices of products sold in interstate commerce. The respondent in the cited case was engaged in the commerce of "selling bread both locally and interstate" and in the course of such business, made price discrimination, maintaining the price in the interstate transactions and cutting the price in the intrastate sales. The *Moore* case is patently inapplicable to the case at bar, in which there was no area of competition between the Journal and the Respondent newspapers outside of the local intrastate market of publication of legal advertising in Los Angeles County.

Urging the applicability of Section 7 of the Clayton Act, Petitioner asserts, *arguendo*, that Consolidated had a virtual monopoly of the relevant market before the Bureau was formed, that the Metropolitan papers

did not compete for legal advertising, that Defendants found it necessary to form the Bureau in order to compete for legal advertising, concluding syllogistically that the Bureau and Consolidated controlled a substantial part of the relevant market and that acquisition of the Journal Assets by Mutual substantially lessened the competition or tended to create a monopoly in the relevant market. [Pet. p. 19]

The realities of the case are that there was and could be no power to control competition in the local intrastate market for legal advertising; neither Consolidated nor Bureau, nor the Respondent newspapers, nor any other newspapers could gain control of the advertisers, the source of supply of legal advertising. There was free competition in soliciting of attorneys, banks, trust companies, escrow and title companies, insurance companies and other advertisers of legal notices. There were other newspapers competing for the same advertising. The Metropolitan News, a legal newspaper, not a member of the Bureau, was the chief competitor of Consolidated. [Dep. of Dan Green, director of Consolidated, R. 680] There are over 300 newspapers of general circulation in Los Angeles County [listed in C. A. Page case Record, p. 371 to 394]. Respondents did not have either the power to control the sale and publication of legal advertising by Consolidated, or the power to exclude Consolidated from the sale and publication of legal advertising.

Consolidated was not in fact excluded from any market and was not restrained from competing with Bureau and non-Bureau newspapers in soliciting for and sale of legal advertising. Consolidated was not deprived of any competitive opportunity in securing

orders for publication of legal advertising. Consolidated did a substantial business in the publication of legal advertising, grossing $1,505,465 from that source in the last five years of its existence prior to its voluntary dissolution. During the same period the aggregate receipts of the more than 100 Bureau papers from legal advertising was only $1,456,510. [Aff. of Edward T. Bergin, R. 853, and Exhibit 8 thereto]

Consolidated's financial condition at the time of its dissolution and distribution of the Journal Assets to its stockholders was sound. It had large cash balances and a large amount of good accounts receivable and had paid regular dividends to its stockholders up to the time of its dissolution. [Admitted Facts, R. 523, 524, and 532] The statement of gross operating income of Consolidated for the ten years preceding the dissolution of Consolidated, which was furnished by the sellers to the purchaser of the Journal Assets, and which was accompanied by the affidavit of the C.P.A. for Consolidated, warranting the correctness of the figures, reflected an excess of $1,022,083 of gross income to Consolidated in the last five years of its existence over its gross income in the previous five years. [R. 714, 721-722] The truth of the matter is that the dissolution of Consolidated was not due to any reduction in earnings or in the value of the Journal, and was not due to any economic pressure by Respondents. The sale of the Journal Assets was not a distress sale. *There was no forced sale of the Journal.* There was no lessening of competitive opportunities, and no control of the relevant market in the sale of legal advertising in Los Angeles County.

Section 7 of the Clayton Act (Title 15, §18 U.S.C.) is not applicable to the intrastate relevant market here involved or to the acquiring of the Journal Assets from individual sellers by Mutual. There is no basis in fact or error in law warranting a review of the case by this Court.

III

The Court of Appeals Has Correctly Applied the Federal Rules of Civil Procedure Invoked by the Parties. Petitioner Was Not Deprived of Any Constitutional Right.

Petitioner's contention that the decision of the Court of Appeals was in effect a denial of her constitutional right to a jury trial is plainly insubstantial. It does expose, however, Petitioner's reason for omitting from the "Statement of the Case" in the Petition the fact that Petitioner had made a Counter-Motion for Partial Summary Judgment on the question of Federal Jurisdiction, accompanied by a requested Partial Summary Judgment "removing from the jury's consideration the question of interstate commerce and the question of jurisdiction." [R. 855-870] Such request was tantamount to a waiver of jury trial on the question of Federal Jurisdiction and for that reason the Court of Appeals in the original decision treated the case as a separate trial on the question of jurisdiction, stating: [290 F. 2d at p. 325]

> "We are satisfied from the record that all evidence germane to the question of jurisdiction was before the court. The parties appear likewise satisfied since *on this appeal appellant does not contend that summary judgment was im-*

proper because of the presence of a genuine issue as to a material fact. Each party argues that under the facts before the trial court each is entitled to a judgment as a matter of law on the issue of jurisdiction. We, therefore, conclude that the parties have in effect consented to a separate trial on the issue of jurisdiction." (Emphasis added)

After decision on appeal, Petitioner seized upon the characterization of the procedural issues on appeal by the Court of Appeals as "in effect consent to a separate trial on the issue of jurisdiction" to petition for rehearing on the ground that petitioner was thereby denied the constitutional right of trial by jury. The Court of Appeals reexamined the record on appeal, and in the decision on the petition for rehearing candidly conceded that "we may have been in error in holding that appellant, in effect, consented to a separate trial before the court on the separated issue of jurisdiction", but held that such conclusion did not require a reversal of the judgment, and denied a rehearing on the appeal. In the opinion on Petition for Rehearing, the Court of Appeals correctly stated the procedural basis for a summary judgment under Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., and based thereon determined that summary judgment in this case was properly granted and therefore correctly concluded that "appellant cannot complain of the deprivation of a jury trial". (Citing cases) [290 F. 2d 334]

The answer to the erroneous contention in the Petition that the Court of Appeals "departed from the accepted and usual course of judicial proceedings"

[Pet. p. 20] is found in the opinion of the Court below [290 F. 2d at p. 334]:

> "We are satisfied from our reexamination of the record that there exists no genuine issue as to any material fact under appellees' motion for a summary judgment and that appellees were entitled to a judgment of dismissal of the action as a matter of law."

There is therefore no basis for this Court to exercise its power of supervision over the Court of Appeals.

IV

There Is No Important Question of Federal Law

Petitioner injects a final argument in the Conclusion of the Petition, to the effect that "the public interest compels a granting of the Petition" [Pet. p. 21] because the Statutes invoked in the case are the federal antitrust laws, taking a statement out of context in the opinion by this Court in *United States v. DuPont de Nemours & Co.*, 6 L. ed. 2d 318, to support such baseless contention. The quoted statement by this Court had reference to the importance of the application of the proper remedy to violations under the antitrust laws in a case where admittedly there was Federal Jurisdiction over the interstate commerce involved. It is fair to state that this Court did not mean to imply by such statement of public importance that this Court should review every antitrust case filed in the Federal Court, regardless of the subject matter or the questions involved.

The unseemly attack on the Court of Appeals in the groundless charge in the Petition that "The Ninth

Circuit has a propensity to ignore the clear mandate of this Court in the antitrust field" [Pet. p. 21] indicates a belief by Petitioner's counsel that this Court has a predisposition to review all antitrust cases and that this Court may be incited to do so in this case in order to discipline the Ninth Circuit. The fatuity of such statement in the Petition is demonstrated by the numerous cases where certiorari to the Ninth Circuit was denied by this Court, as illustrated in the frequently cited case of *Foster and Kleiser Co. v. Special Site Sign Co.*, (9 Cir.) 85 F. 2d 742, (Cert. Den. 299 U. S. 613) in which the circuit court held that there was no Federal Jurisdiction because the alleged conspiracy affected the business of the plaintiff in its "intrastate aspects". Certiorari to the Ninth Circuit was also denied in the case of *Balian Ice Cream Co. v. Arden Farms Co.*, (9 Cir.) 231 F. 2d 356 (Cert. Den. 76 S. Ct. 545, 350 U. S. 991, 100 L. ed. 356), where the court considered only that activity or part of Arden's dairy business with which plaintiffs were in competition.

The "last-ditch" effort of Petitioner to engage the attention of this Court by such apocryphal charge against the Ninth Circuit does not convert a correct decision in this simple case, applying the well-established test of Federal Jurisdiction into an important question of Federal Law merely because the antitrust statutes are invoked in the case.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that there is no ground for review of the

decision below turning upon the special facts of this case, and this petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 8, 1961